BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

IDALMYS RODRIGUEZ	)	
Claimant	)	
V.	)	
	)	
NATIONAL BEEF PACKING COMPANY, LP	)	Docket No. 1,057,888
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge Pamela J. Fuller's November 4, 2013 Order to Dismiss. Both parties have submitted briefs and the case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Conn Felix Sanchez, of Kansas City, Kansas, appeared for claimant. Shirla R. McQueen, of Liberal, Kansas, appeared for respondent and insurance carrier (respondent).

RECORD AND STIPULATIONS

The appeal record is the same as that considered by the judge and consists of claimant's January 13, 2012 deposition transcript, the July 13, 2012 preliminary hearing transcript and exhibits thereto, the July 12, 2013 motion hearing transcript, and the November 1, 2013 motion hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file, including respondent's Motion to Dismiss, with exhibits. Claimant did not file a written response to such motion or object to the exhibits. No stipulations were taken by the court or presented by the parties.

ISSUES

The Order indicated "claimant is refusing to submit to the medical examination as ordered and the pending proceedings are for the purpose of determining the amount of compensation due." Pursuant to K.S.A. 44-518, the judge dismissed the claim.

Claimant requests the Order be reversed and argues the judge did not have jurisdiction to dismiss the case under K.S.A. 44-518 because the independent medical examination (IME) was ordered under K.S.A. 44-516, not K.S.A. 44-515. Further, claimant asserts respondent did not provide adequate medical mileage or transportation pursuant to K.S.A. 44-515.

Respondent contends the Order should be affirmed. Respondent argues the judge had jurisdiction to dismiss the case under K.S.A. 44-518 because the medical examination was not only for the purpose of determining additional medical treatment, but also to provide his opinion regarding claimant's permanent partial impairment of function, if any, if she had reached maximum medical improvement.

The sole issue for the Board's review is: Was dismissal of this claim proper?

FINDINGS OF FACT

Claimant filed an application for hearing on October 3, 2011 alleging injury to her left shoulder, left hand and neck as a result of a slip and fall on July 19, 2011.

Claimant demanded medical treatment. A preliminary hearing was held July 13, 2012. The judge denied the request, finding claimant was at maximum medical improvement according to two physicians.

A second preliminary hearing for medical treatment was scheduled for November 9, 2012. In lieu of preliminary hearing, the parties agreed to refer the claimant for a court-ordered independent medical examination with Dr. Terrence Pratt. An appointment was scheduled for January 3, 2013.

On December 27, 2012, respondent's counsel sent an email to claimant's counsel asking about the agreed order and joint letter. Claimant's counsel responded that the appointment would need to be canceled because he did not believe claimant would travel to make the appointment.[1] Shortly thereafter, respondent's counsel received the signed paperwork for the IME from claimant's attorney and asked claimant's attorney if the appointment should be rescheduled. Claimant's counsel responded in the affirmative and indicated he believed his client was looking to just get a rating and move on.[2]

On January 4, 2013, an Agreed Order was issued, pursuant to K.S.A. 44-516, requesting Dr. Pratt provide opinions regarding: (1) claimant's need for medical treatment; (2) whether claimant's work was the prevailing factor in any need for treatment and her medical condition; and (3) whether claimant had any permanent impairment of function.

Claimant's appointment with Dr. Pratt was rescheduled for February 21, 2013. Claimant's counsel phoned respondent's counsel on February 19, 2013 to advise the appointment with Dr. Pratt would need to be canceled as he had been unable to reach his client.[3]

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[1] Motion to Dismiss (filed June 14, 2013), Ex. A.

[2] *Id.*, Ex. C.

[3] *Id.*, Ex. E.

On March 26, 2013, respondent's counsel contacted claimant's counsel about rescheduling the IME. Claimant's counsel again indicated he had been unable to reach his client and not to reschedule the IME at that time.

On June 14, 2013, respondent filed a motion to dismiss. A hearing was scheduled for July 12, 2013. The day before the hearing, claimant's counsel filed a response indicating his client was living in Miami, Florida, and requesting the court "enter an order requiring Respondent to provide either medical mileage or an airline flight so Claimant can attend her appointment with Dr. Terrence Pratt."[4]

Claimant did not appear for the July 12, 2013 hearing. Claimant's counsel argued claimant had not been advanced mileage so was under no obligation to attend. Respondent argued they were just notified claimant had moved to Miami, Florida, and mileage had never been requested. The judge denied respondent's motion after finding "respondent was unable to show that medical mileage had been provided to the claimant prior to the scheduled evaluations as required by K.S.A. 44-515."[5]

The appointment with Dr. Pratt was again rescheduled for September 5, 2013. Medical mileage was advanced to claimant. Claimant never cashed or deposited the check. Claimant did not attend the scheduled appointment. On September 13, 2013, the judge received a letter from Dr. Pratt stating:

> [Claimant] was scheduled for an Independent Medical Evaluation today and did not present or contact the office in relation to the visit. 58 minutes were utilized reviewing records in preparation for this assessment.[6]

Respondent filed a second motion to dismiss, noting claimant "failed and/or refused to attend the September 5, 2013 appointment."[7]

A hearing on the second motion was scheduled and held on November 1, 2013. Claimant did not appear. Respondent argued mileage had been advanced even though the check had not been cashed. Respondent asserted prejudice because claimant's refusal to attend the IME resulted in it not knowing whether her physical condition changed due to something unrelated to her work injury. Claimant's counsel argued his client was not refusing to attend the IME. Claimant's counsel also asserted the judge did not have jurisdiction to dismiss the case under K.S.A. 44-518 because the Agreed Order had been issued pursuant to K.S.A. 44-516, not K.S.A. 44-515.

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[4] Response to Motion to Dismiss (dated July 11, 2013).

[5] Order Denying Motion (dated July 15, 2013).

[6] Letter from Pratt dated Sept. 5, 2013.

[7] Motion to Dismiss (dated Sept. 19, 2013)

On November 4, 2013, the judge issued an Order to Dismiss stating:

That on the 4th day of January 2013, an Agreed Order For Independent Medical Examination was entered. That order was pursuant to K.S.A. 44-516. The order specifically requested that it be determined if the claimant was in need of medical treatment; whether the claimant's work was the prevailing factor in her need for treatment if there was a need; and if the condition was work related but there was not need for treatment, whether the claimant suffered any permanent partial impairment of function. The appointment was scheduled for February 21st, 2013 and then canceled as the claimant informed counsel that she was not coming. It was reset for March 26th, 2013 and again had to be canceled due to the claimant's refusal to attend the appointment. The appointment was again set for September 5th, 2013, mileage was paid in advance and the claimant again did not attend the appointment. K.S.A. 44-518 states in relevant portion that "If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination."

After careful review of the evidence and arguments presented, it is found that the claimant is refusing to submit to the medical examination as ordered and the pending proceedings are for the purpose of determining the amount of compensation due. Therefore, the respondent's request for dismissal of the case should be and the same is hereby granted.

Thereafter, claimant filed a timely application for review by the Board.

PRINCIPLES OF LAW

K.S.A. 44-515(a) states in part:

If the employee is notified to submit to an examination before any health care provider in any town or city other than the residence of the employee at the time that the employee received an injury, the employee shall not be required to submit to an examination until such employee has been furnished with sufficient funds to pay for transportation to and from the place of examination at the rate prescribed for compensation of state officers and employees under K.S.A. 75-3203a, and amendments thereto, for each mile actually and necessarily traveled to and from the place of examination, any turnpike or other tolls and any parking fees actually and necessarily incurred, and in addition the sum of $15 per day for each full day that the employee was required to be away from such employee's residence to defray such employee's board and lodging and living expenses.

K.S.A. 44-516(b) states in part:

The health care provider agreed to by the parties or selected by the administrative law judge pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 44-518 states:

If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

Neal[8] contains a detailed overview of K.S.A. 44-518:

K.S.A. 44–518 is designed to preserve the employer's right to discovery through examination by a doctor of the employer's choice. The examination provided for in 44–515 is the discovery tool for the benefit of the employer. It provides the employer an opportunity to seek independent medical opinions of an employee's condition during the pendency of the employee's claim for benefits. The statute does not provide that the employer has an absolute right to an examination at the time and place of its choosing; rather, the examination must be at a reasonable time and place. In protecting the employer's right to this discovery, K.S.A. 44–518 provides that if the employee refuses, obstructs, and prevents the employer from exercising its option for examination under 44–515, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and such examination is completed.

The very nature of the language used in 44-518 suggests that before suspension of benefits, there must be an affirmative act on the part of the employee to frustrate the employer's discovery or examination. In our interpretation of 44-518, we follow a familiar maxim of statutory construction which provides: "Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. [Citation omitted.]" *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

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[8] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425, 436 (2003).

> Black's Law Dictionary defines "refusal" as "[t]he act of one who has, by law, a right and power of having or doing something of advantage, and decline it." Black's also indicates that the declination of a request or demand, or the omission to comply with some requirement of law, be "*as the result of a positive intention to disobey*." (Emphasis added.) *Refusal* is often coupled with "neglect," but Black's notes that neglect signifies a mere omission of a duty "*while 'refusal' implies the positive denial of an application or command, or at least a mental determination not to comply*." (Emphasis added.) Black's Law Dictionary 1282 (6th ed.1990).
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> "Obstruct" is defined as "[t]o hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of a difficult and slow.... To impede." Black's Law Dictionary 1077 (6th ed.1990).
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> The ordinary meaning of the words used in K.S.A. 44-518 contemplate a positive intention to disobey and to hinder. We believe K.S.A. 44-518 contemplates circumstances where an employee makes a deliberate decision not to attend the examination or to obstruct or prevent the employer from gathering its own independent evaluation of his medical condition. Thus, the Board's interpretation that there must be an element of willfulness or intent is consistent with the ordinary meaning of the words of K.S.A. 44-518.
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> . . .
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> Based upon the cases cited above and the clear import of K.S.A. 44–518 we, like the Board, conclude that the terms "refusal" and "unnecessarily obstructs" carry with them an element of willfulness or intent.[9]

ANALYSIS

The Board previously held K.S.A. 44-518 only applies when a claimant refuses to attend a K.S.A. 44-515 evaluation scheduled by the employer, and it does not apply to an employee's refusal to submit to an examination at the request or order of an administrative law judge.[10] K.S.A. 44-518 could be read to suggest the entire statute applies to evaluations scheduled by the employer, but is subject to differing interpretations. The first sentence of the statute clearly applies to evaluations requested by the employer. Arguably, the last sentence of the statute pertains to any examination, including court-ordered neutral evaluations, not just examinations arranged by the employer under K.S.A. 44-515.

The Board need not answer this question. Unlike the judge's finding, the Board does not conclude claimant advised her attorney that she was not going to the February 21, 2013 appointment. Nor is there evidence claimant took affirmative steps to obstruct or prevent the appointment. Rather, the record indicates the February 2013 appointment was cancelled because claimant's counsel was unable to contact his client.

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[9] *Id.* at 14-16.

[10] *Raglon v. United Parcel Service*, Inc., No. 1,041,279, 2010 WL 2242754 (Kan. WCAB May 17, 2010).

Contrary to another of the judge's findings, the record does not show that claimant refused to attend a March 26, 2013 IME. No IME was set to occur on March 26, 2013. Rather, it appears claimant's counsel advised respondent's counsel on March 26, 2013 that he was still unable to communicate with his client, such that scheduling the IME would be a fruitless effort.

Based on the current record, there is insufficient evidence claimant was even aware of any appointment, including the September 5, 2013 appointment. Respondent's motion indicates claimant's attorney was repeatedly unable to reach his client. This assertion was made at both motion hearings and in respondent's brief to the Board. Respondent further suggested claimant's counsel does not even know his client's location. If claimant's counsel could not reach his client and claimant were unaware of the appointments, it cannot be said she refused to submit to any IME or obstructed or prevented the same. Under the *Neal* analysis, the record does not establish claimant was deliberately willful or disobedient in not attending the IME. The record establishes claimant did not attend the IMEs, which is not tantamount to an outright refusal to submit to an examination. The evidence may eventually prove claimant refused to attend the IMEs, but such proof is currently insufficient.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the November 4, 2013 Order should be reversed.

AWARD

WHEREFORE, the Board reverses the November 4, 2013 Order.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Pamela J. Fuller